**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 3642 OF 1992**

1. Shree Vidhya Paper Mills.

2. Mr.Rameshwarlal Motilal. ... Petitioners.

V/s.

1. Union of India.

2. Collector of Central Excise
and Customs.

3. Assistant Collector of
Central Excise & Customs,

4. Collector Central Excise
& Customs (Appeals). ... Respondents.

Manoj Sanklecha i/b. M/s.Kanga & Co.
for the petitioners.

R.V.Desai, senior counsel with Mrs.S.V.Bharucha
and Mrs.N.V.Masurkar for the respondents.

**CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.**

**RESERVED ON : 26th April 2005**

**PRONOUNCED ON : 26th April 2005.**

**JUDGMENT :** (Per V.C.Daga, J.)
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. The petitioners herein are claiming refund of amount of cess paid under protest, in spite of having recovered the same from their customers, contending that the respondents have no authority to retain the said amount as such denial of refund of Rs.10,19,246/- paid under protest as cess during the period from 1st March, 1981 to 6th June, 1990 under the Paper and Paper board Cess Rules, 1981 ("Cess

Rules, 1981" for short) framed under Industries (Development Regulation) Act, 1951 ("IDR Act, 1951" for short) is bad and illegal. The petitioners, consequently, have prayed for quashing and setting aside the orders dated 13th December, 1989 and 25th June, 1990 passed by the Assistant Collector of Central Excise & Customs, Nasik, respondent No.3 herein; and also prayed for direction to refund amount of cess with interest.

2. The petitioners have also challenged the constitutional validity of section 11-B brought on the statute by way of the Central Excise and Customs (Amendment) Act, 1991 ("Amendment Act of 1991" for short). However, now challenge in this behalf does not survive since the Apex Court in the case of **Mafatlal Industries Ltd. v. Union of India**, 1989 ELT 249 has upheld the validity of section 11B of the Central Excise Act, 1944.

3. Before dealing with the points raised by the parties in the present petition, relevant facts of the case may be stated in brief.

**The Facts :**
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4. The petitioner No.1 Shree Vindhya Paper Mills Limited, inter alia; manufactures quoted

paper boards. The quoted paper boards are manufactured out of purchased cess-paid base paper. According to the petitioners, the respondents compelled them to pay cess on the quoted paper boards manufactured by them under the Cess Rules, 1981. Accordingly, the cess was paid by them under protest during the period from 1981 to 1990 since they were of the view that no cess is payable on the products manufactured out of cess-paid base paper. Petitioners, from time to time, filed refund applications to claim refund of cess paid by them under protest under the Cess Rules, 1981.

5. According to the petitioners, all the refund applications moved by them were kept pending by the respondents for long time contending that the issue of excisebility of cess on base paper coated with China Clay was under examination by the Ministry of Industry. In the year 1990, the Central Board of Excise and Customs accepted the clarification given by the Ministry of Industries of respondent No.1 that no cess is payable on coated paper manufactured out of cess-paid base paper. Consequently, the petitioners requested respondent No.3 to allow their refund applications to the extent cess was paid on the manufactured paper boards. The petitioners state that out of six refund applications four came

to be rejected advising them to file appeals before the Commissioner of Central Excise (Appeals), respondent No.4 herein.

6. The petitioners, accordingly, preferred appeals as directed. On 9th April, 1992, the respondent No.4 allowed petitioners' appeals. The order rejecting refund applications came to be set aside and the proceedings were remanded back to respondent No.3 to examine refund claims on the touchstone of doctrine of unjust enrichment. The respondent No.3 thus called upon the petitioners on 10th April, 1992 to furnish documentary evidence to establish that the amount of cess, refund of which was being claimed, was not recovered by them from their customers.

7. According to the petitioners, the above notice issued by the respondent No.3 was pregnant with clear indication that respondent No.3 will not apply the provisions of the Amendment Act of 1991 so as to defeat the petitioners' claim for refund. According to the petitioners, the doctrine of unjust enrichment cannot be applied, firstly, since the cess during the period 1st March, 1981 to 6th June, 1990 were paid under protest. Secondly, section 11B of the Central Excise Act, 1944 ("Central Excise

Act" for short) in 1991 cannot be read in Cess Rules, 1981 since the provisions dealing with grant of refund in Central Excise Act having been incorporated in to the Cess Rules in 1981 as they were existing in 1981, it being a legislation by incorporation subsequent amendment to section 11B made in the year 1991 to the Central Excise Act, 1944 cannot be read into it.

**Submissions:**
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8. Mr.Sanklecha, learned counsel for the petitioners with a view to lay foundation to his submissions states that cess is levied and collected as a duty of excise on the goods, namely, paper and paper boards, under the provisions of section 9 of the IDR Act, 1951. The Central Government has framed rules known as "Paper and Paper Board Cess Rules 1981", inter alia; for levy and collection of cess on paper and paper board, in exercise of its powers under section 30 of the IDR Act, 1951. Rule 3 of these Rules provides for application of the Central Excise and Salt Act and Rules made thereunder in relation to the levy and collection of cess on paper and paper board. Said Rules came into force on 16th February, 1981.

9. According to Mr. Sanklecha, the aforesaid rule, namely, rule 3 incorporates the provisions of the Excise Act and Rules made thereunder in the said Cess Rules. The effect of incorporation is as if the said provisions, as they stood at the date of the said Cess Rules, were written out in the said Cess Rules and became a part of it. Rule 3 is, thus, an instance of legislation by incorporation. On such incorporation, the provisions incorporated have become integral part of the said Cess Rules in which the former have been transposed. Any subsequent amendment made in the said provisions (in the statute form which the incorporation is made, namely, here the Excise Act) has no effect on the incorporating statute, namely, the Cess Rules, 1981.

10. Mr. Sanklecha, learned counsel submits that section 11B of the Central Excise Act as it stood on 16th February, 1981 was, thus, incorporated in the Cess Rules, 1981 as if the said rule had actually been written in it and, thereafter, there cannot be any occasion to refer to section 11B in the Excise Act or amendments thereto subsequent to the date of incorporation. In other words, the provisions of Central Excise Act have been incorporated by specific reference in 1981 in rule 3 of the Cess Rules 1981. In the circumstances, any amendment to

the Central Excise Act post 1981 is not to be considered while interpreting and applying the provisions of Cess Rules, 1981.

11. Mr.Sanklecha, learned counsel for the petitioners fairly pointed out that an identical provision under Jute Manufactures Cess Rules, 1976 ("Jute Cess Rules" for short); identical to rule 3 of the Cess Rules, 1981 was considered in the case of **Barnagore Jute Factory Co. v. Inspector of Central Excise**, 1991 (57) ELT 3 (SC) and in para-18 thereof the Apex Court was pleased to hold that the Central Excise Act had not been referred to by incorporation under the Jute Cess Rules, 1976 but by way of reference it was referred to in the Jute Cess Rules. Thus, it was a legislation by reference, and not by incorporation. This conclusion was reached by the Apex Court holding that the effect of rule 3 in Jute Cess Rules is that the words "as if the words for the time being in force" were there after the words "the provisions of Central Excise and Salt Act 1944" in rule 3 of Jute Cess Rules. Mr. Sanklecha would submit that the words "for the time being in force" are not to be found either in rule 3 of the Jute Cess Rules or the Cess Rules, 1981 as such the Apex Court could not have added the said words to rule 3 of Jute Cess Rules. In support of

his submission that no words could have been added while interpreting a statute, he placed reliance on the judgment of the Apex Court in the case of **State of Maharashtra v. Nanded Parbani Z.L.B.M.V. Operator Sangh**, 2000 (2) SCC 69; wherein it has been held that where the language of statute is clear it is not open to the Court to add the words into a statute. Further, according to the learned counsel for the petitioners, the factual issue involved in the case of **Barnagore Jute Factory Co.** (supra) was whether or not intermediate goods were liable to duty before amendment to rules 9 and 49 of the Central Excise Rules, 1944. The Apex Court took into account the fact that even under the unamended rules 9 and 49 of the Central Excise Rules, 1944 the intermediate goods were liable to duty. According to the learned counsel for the petitioners, the aforesaid decision is based on its own facts and, therefore, clearly not applicable to the facts of the present case.

12. According to Mr. Sanklecha, in view of his above submission, rule 3 of the Cess Rules, 1981 is required to be examined independently to determine whether or not the provisions of Excise Law with regard to refund have been incorporated by reference or is a mere reference in the Cess Rules, 1981.

13. Learned counsel for the petitioners drew our attention to the judgments of the Apex Court in the case of **Nagpur Improvement Trust v. Vasantrao**, (2002) 7 SCC 657, **U.P.Avas Vikas Parishad v. Jainul Islam**, (1998) 2 SCC 467 and **Mahindra and Mahindra Ltd. v. Union of India**, (1979) 2 SCC 529. In all these judgments, the Apex Court has, in very clear terms, held that incorporation by reference meant that the provisions of earlier legislation to which reference is made is deemed to have been incorporated into latter legislation. Further any amendment done in such a case to the earlier Act would be of no consequence while construing the latter Act. Whereas; legislation by reference would mean that the subsequent legislation merely contains a reference to an earlier statute in general and in such a case any amendment made to the earlier statute subsequent to the enactment to the latter Act would be considered to be a part of the latter Act at the time when the latter Act is sought to be applied.

14. Mr.Sanklecha, on the basis of the judgments referred to hereinabove, contends that the Central Excise Act as existed in 1981 has been incorporated by specific reference into Cess Rules, 1981. This

is on account of the fact that the Cess Rules, 1981 make a specific reference to the Central Excise Act and not a general reference to the said Act. Therefore, according to learned counsel for the petitioner, section 11B of the Central Excise Act as existing in 1981 alone needs to be applied while considering any application for refund under the Cess Rules, 1981 and any amendment subsequent to 1981 in the Central Excise Act needs to be ignored.

15. Mr.Sanklecha, further submits that the rule of interpretation, viz., incorporation by reference and/or mere reference of an earlier Act into a latter Act can only be applied while interpreting laws made by the Legislature and not to subordinate/delegated legislation. That the above principles of interpretation are applied to legislations made by the Legislature as the Legislatures are short of time and the above short cut method of incorporation by reference and reference is used because there is pressure upon the legislative time. However, he submits that so far as delegated or subordinate legislation is concerned, one of the primary reasons for its growth is in view of pressure upon the legislative time enabling the delegate or subordinate legislation to enact a detailed legislation not requiring short

cuts to frame legislations. Therefore, in his submission, the refund of cess should be considered by the authorities by applying Central excise Act as it existed in 1981 when the Cess Rule 1981 was notified. According to him, if the subsequent amendments to the Central Excise Act, like those made in year 1991; were to be made applicable to the Cess Rules 1981, then the delegated legislation would have carried out necessary amendment to the delegated legislation. In absence of such amendment to the Cess Rules, 1981, the Central Excise Act as it existed in 1991 alone is to be applied.

16. Mr.Sanklecha submitted that in any view of the matter rule 3 of the Cess Rules, 1981 uses the expression "so far as may be" while applying Central Excise Act to it, as such clearly makes the Central Excise Act applicable only to such an extent as may be necessary and not otherwise. In his submission, doctrine of unjust enrichment found in section 11B of the Central Excise Act requires that the amount recovered from the customers as excise duty to be credited to the Consumers Welfare Fund. This amount which is recovered by the manufactures from its customers is used for the general benefit of the consumers. So far as the Cess Rules under the IDR Act, 1951 is concerned, the object of imposing the

cess is for betterment of the industry from which the cess is recovered. Thus, according to learned counsel for the petitioners, in the circumstances between the two, i.e. consumers and the petitioners it would be the petitioners who would be better fulfilling the object of the Cess Rules framed under the IDR Act, 1951 rather than the consumers. Based on this submission, Mr.Sanklecha, submitted that the provision of unjust enrichment under section 11B of the Central Excise Act would thus not be applicable to the cases of refund of cess under the Cess Rules, 1981. He submits that the rule is liable to be made absolute in terms of prayer clauses in the petition.

**Per Contra :**
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17. Mr.R.V.Desai, learned senior counsel appearing for the respondents, submits that in rule 3 of the Cess Rules, 1981 the provisions of Central Excise Act and rules framed thereunder including those relating to refund were incorporated by reference, as such the amended provision of section 11B of the Central Excise Act will apply to the case on hand. That refund is not allowable unless and until the petitioners prove that the burden has not been passed on to their customers.

18. Mr.Desai further submitted that respondent No.3 has clearly noticed on scrutiny of refund claim that the petitioners have collected from their customers the amount of cess paid by them. No proof contrary thereto has been produced as such the claim for refund set up by the petitioners is not maintainable.

19. Mr.Desai pressed into service one passage from page 279 of the book of Justice G.P.Singh, titled as "Principles of Statutory Interpretation" reading as under:

> "A statute may instead of referring a particular previous statute or to any specific provision therein refer to law on the subject generally. In such cases, the reference is construed to mean the law is as it reads including the amendment subsequent to the time of adoption."

Respondent also placed reliance on various judgments of the Apex Court in the case of **Barnagore Jute Factory Co.** (supra); **Collector of Customs v. Sampathu Chetty**, AIR 1962 SC 316; **M/s.Ujagar Prints v. Union of India**, AIR 1989 SC 516 : (1989) 3 SCC 488 (para-92, 93, 94 and 95)

20. In the light of the above judgments of the Apex Court, learned counsel for the respondents submits that rule 3 of the Cess Rules, 1981

incorporates the provisions of Central Excise Act and Rules framed thereunder by reference and, therefore, all the amendments which are made to the Central Excise Act and Rules are required to be made applicable. In view thereof, in his submission, Chapter-2 of the Central Excise and Customs Law (Amendment) Act, 1991 is applicable and the petitioners are not entitled to any refund in as much as there is non-compliance with the provision of section 11B as amended.

21. Alternatively, without prejudice to the aforesaid contention, it is further submitted that at any rate on the principles of unjust enrichment no refund should be granted in exercise of powers under Article 226 of the Constitution of India. The respondents, in support of their submission, placed reliance on the judgment of the Apex Court in the case of **Sahakari Khand Udyog Mandal Ltd. v. Commissioner of C.Ex. & Cus.**, 2005 (181) ELT 328 (SC) and judgment of this Bench in the case of **Bussa Overseas and Properties Pvt.Ltd. v. Union of India**, 2003 (158) ELT 135 (Bom). It is, thus, submitted that the petition is devoid of any substance and the same is liable to be dismissed.

**Consideration :**
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22. Having heard rival parties, in our view, it is not necessary for us to delve upon the issue raised by learned counsel for the petitioners that the provision of refund in Central Excise Act has been incorporated into the Cess Rules, 1981 and any subsequent amendments to section 11B of the Central Excise Act will not be applicable, in view of the judgment of the Apex Court holding the field.

23 The Apex Court in the case of **Barnagore Jute Factory** (supra) was concerned with interpretation of rule 3 of Jute Cess Rules by which provisions of Central Excises and Salt Act, 1944 and Rules framed thereunder including those relating to refund of duty were made applicable. The rule involved in the case on hand which warrants interpretation is rule 3 of the Cess Rules, 1981 which is identical to rule 3 of the Jute Cess Rules. Both the rules are quoted hereinbelow for immediate reference. Rule 3 of Cess Rules, 1981 reads as under:

> "3. Save as otherwise provided in these rules the provisions of Central Excise Act, 1944 and the Rules made thereunder including those relating to refund of duty shall so far as may be applied in relation to levy and collection of cess as applied in relation to levy and collection of duties of Excise on paper and paper board under that Act and rules made thereunder."

Rule 3 of the Jute Cess Rules reads as under:

> "3. -- Application of Central Excises and Salt Act and the Rules made thereunder -- Save as otherwise provided in these rules, the provisions of the Central Excises and Salt Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refund of duty, shall, so far as may be, apply in relation to the levy and collection of the cess as they apply in relation to the levy and collection of the duty of excise on jute manufactures under that Act."

24. In **Barnagore Jute Factory Co.** (supra), while interpreting the rule identical to the above-referred rule 3 of Cess Rules, 1981, Apex Court observed as under:

> " We think it convenient to deal with the contentions of Sri Ganesan at this stage, which we have set out hereinbefore. His main contention is that Rule 3 of the Jute Cess Rules is a case of legislation by reference and that in such a case the provisions of the Central Excise Act and the rules made thereunder as they were obtaining on the date of making of Rule 3 continue in the same form, unaffected by subsequent amendments or changes in the Central Excise Act and Rules. He, therefore, says that the amendment effected in 1982 in Rules 9 and 49 of Central Excise Rules is not available/or applicable to the levy and collection of cess under Section 9 of the Act. He also points out that the Act does not confer upon the Central Government the power to make rules with retrospective effect. He relied upon the decision of this Court in Mahindra & Mahindra v. Union of India &S Another [1979 (2) S.C.R. 1038]. In our opinion, however, the very approach of the learned counsel is based upon an incorrect premise. Firstly, it is not true to say that rules 9 and 49 of the Central Excise Rules, as they stood before the 1982 amendment, did not permit levy on capitively consumed goods."

25. Since the aforesaid rule has already been interpreted by the Apex Court, to mean that it was not referred to by incorporation under the Jute Cess Rules but only a reference thereof had been made in the Jute Cess Rules. This conclusion reached by the Apex Court by holding that the effect of rule 3 in Jute Cess Rules is that the words "as if the words for the time being in force" were there after the words "the provisions of Central Excise and Salt Act 1944" in rule of the Jute Cess Rules as on date binds us. The contention of the petitioners that the Apex Court could not have added the words to rule 3 of the Jute Cess Rules cannot be accepted.

26. Another judgment on the touchstone of doctrine of unjust enrichment delivered by the Apex Court in the case of **Sahakari Khand Udyog Mandal Ltd.** (supra) also seals the fate of the petitioners. The Apex Court, after taking survey of various judgments delivered by it on the subject, held as under:

> 48. From the above discussion, it is clear that the doctrine of 'unjust enrichment' is based on equity and has been accepted and applied in several cases. In our opinion, therefore, irrespective of applicability of Section 11B of the Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. Section 11B of the act or similar provision merely gives legislative recognition to this

> doctrine. That, however, does not mean that in absence of statutory provision, a person can claim or retain undue benefit. Before claiming a relief of refund, it is necessary for the petitioner/appellant to show that he has paid the ;amount for which relief is sought, he has not passed on the burden on the consumers and if such relief is not granted, he would suffer loss.
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> 49. In the present case, not only no such case has been made out by the appellant-Mandal, the position is to the contrary. All the authorities below have expressed recovered a finding that the appellant-Mandal has recovered the amount from consumers and as such excise duty is passed on the consumers/customers. In view of specific finding, in our opinion, the conclusion is inescapable that the appellant-Mandal is not entitled to claim any amount. allowing exemption or refund of amount would result in 'unjust enrichment' by the appellant which cannot be permitted. In our opinion, therefore, even on that count, orders passed by the authorities and refusal to grant benefit cannot be held arbitrary, unreasonable or inequitable. The said ground also, therefore, has to be rejected.

27. The aforesaid judgment of the Apex Court in clearest possible term has held that the doctrine of unjust enrichment is based on equity and the same is very much applicable irrespective of application of section 11B of the Central Excise Act. Such similar provision merely gives recognition to the equitable doctrine of unjust enrichment. Absence of statutory provision does not mean that, a person can claim or retain undue benefit. Before claiming a relief of refund, the person claiming refund must show that he has paid the amount for which relief is sought;

that he has not passed on the burden on the consumers and that if such relief is not granted, he would suffer loss.

28. In the instant case it is not in dispute that the petitioners have recovered the cess from their customers. In view of this undisputed fact, it is an academic debate as to whether or not incorporation of the provisions of the Central Excise Act is a legislation by incorporation or by reference. Irrespective of the applicability of section 11B of the Central Excise Act, no refund can be allowed unless it stands to the test of doctrine of unjust enrichment.

29. This bench in the case of **Bussa Overseas and Properties Pvt.Ltd.** (supra) had an occasion to consider an identical issue based on identical submission; wherein this Court ruled as under:

> " Even otherwise, while exercising the Writ jurisdiction, if the Writ Court finds that any direction to refund results in unjust enrichment to the Petitioner, then it is open to the Writ Court to decline to exercise its Writ jurisdiction, even though the Petitioner has a right to obtain refund. This reasoning of ours is supported by the Full Bench decision of this Court in the case of New India Industries v. Union of India reported in 1990 (46) E.L.T. 23 (Bom.) = 1990 (1) BCR 515, as well as the decision of the Apex Court in the case of Mafatlal Industries Ltd. (supra at Para 95). In the present case, admittedly, the

> Petitioners have passed on the incidence on duty to the customers and have recovered the amount due to them. In this view of the matter, we declined to issue Writ in favour of the Petitioners."

30. For the aforestated reasons, in our view, the petition is devoid of any substance and the same is thus liable to be dismissed. In the result, petition fails. Rule stands discharged with no order as to costs.

**(J.P.DEVADHAR, J.)** **(V.C.DAGA, J.)**